certainly should not refuse the same thing in another form.

We should, therefore, have preferred to let a subscribing witness to a will who volunteers to discredit himself by impeaching his own solemn attestation, stand upon such impeachment alone, inasmuch as we regard it by far the most effectual impeachment which could be offered, inasmuch as it is altogether deliberate and without apology or excuse.

The Vermont practice in the Probate Court for a great number of years, and especially the recent statute there, allowing the Probate Court, in their discretion, to grant probate of wills upon the testimony of one witness, when no one appears to contest it, give great countenance to the rule established in this case.

There can be no doubt that instructions given by the testator for drawing a will, or the draft, if known to him or made in conformity with his instructions, although not executed by him, is of great importance upon any question of testamentary capacity or undue influence.

The other points decided seem most unquestionable. I. F. R.

District Court of Philadelphia.

CREIGHTON v. LADLEY.

Where a copy of a lease was duly certified to have been acknowledged before a magistrate, and recorded with the mortgage under the Act of 27th April 1855, respecting chattel mortgages, it was held, that, in the absence of evidence of fraud, and where the question was not upon the execution and delivery of the lease, the certificate could not be contradicted by parol evidence.

RULE for new trial.

McCall, for plaintiff.

Blackburn, for defendant.

Opinion by

SHARSWOOD, P. J.—This was an action of replevin for machinery and fixtures in a woollen-mill. The title of the plaintiff was as a purchaser at sheriff's sale under a *pluries levari facias* upon a mortgage of lease and machinery from William Tomlinson, lessee from Sarah Hurst to Hugh Creighton and Joshua Pearce.

The plaintiff's title depends upon the Act of 27th April 1855, § 8, Pamph. Laws 369, by which it is "declared to be lawful for every lessee, for term of years, of any colliery, mining land, manufactory, or other premises, to mortgage his or her lease or term in the demised premises, with all buildings, fixtures, and machinery thereon, to the lessee belonging or thereunto appurtenant, with the same effect as to the lessee's interest and title, as in the case of the mortgaging of a freehold interest and title as to

lien, notice, evidence, and priority of payment: Provided, that the mortgage be in like manner acknowledged and placed of record in the proper county, *together with the lease;* and that such mortgage shall in nowise interfere with the landlord's right, priority, or remedy for rent; and such mortgages may be sued out as in other cases."

The defendants objected in the case before us to the validity of the plaintiff's title because the lease was not recorded with the mortgage. The fact was, that the instrument left with the recorder of deeds and recorded by him was not the original lease, but a copy of it. Such copy, however, although appearing to be a copy on its face, had annexed to it a regular acknowledgment before an alderman, in which it was duly certified that Mrs. Hurst had personally appeared before the alderman and had acknowledged that paper to be her act and deed, and desired the same to be recorded as such.

Parol evidence was admitted on the trial, to contradict this certificate, and the jury have found against it. The judge before whom the case was tried is satisfied, that upon the weight of the evidence the verdict was right. We do not, therefore, enter upon that question. The only point that remains is, whether, in the absence of fraud or collusion in the grantee or mortgagee, effect ought to be given to such parol evidence? There could be no pretence of any fraud in this case. It was not denied that there was such a lease; that Mrs. Hurst had executed it; that it was a valid subsisting lease; and that the copy to which the certificate was appended was a true copy. Mrs. Hurst, the lessor, who was examined as a witness, denied that she had acknowledged that paper to be her act and deed before the alderman. She admitted that she acknowledged before him that she had executed a lease; that was what she went before him to do.

Mrs. Hurst was *sui juris*. The acknowledgment and recording the lease did not place her in any worse condition than she was already in. It was necessary to enable the lessee to give a valid and effectual mortgage under the act, but that in no way affected her interest. It was her duty to acknowledge it; she probably could have been compelled, by a decree in equity, to do so, especially if the case was so circumstanced that it could not be placed on record in any other way.

As the majority of the court think, that in the absence of fraud

or collusion in the mortgagee or grantee, parol evidence ought not to have been allowed to contradict the certificate of acknowledgment, it is unnecessary to discuss the question whether a true copy of a lease referred to in a mortgage and annexed to it, and in fact recorded with it, though not entitled to be recorded as an independent paper, is or is not a compliance with the provisions of the Act of Assembly.

It is not pretended, that if Mrs. Hurst did, in the terms of the certificate, personally appear and acknowledge that paper to be her act and deed, it would not make it so, even though in point of fact it was written, signed, and sealed by another person, if there was no fraud on her intended or practised. If so, the case of *Jamison* v. *Jamison*, 3 Whart. 457, is in point. It was there solemnly decided that the certificate of the judge or justice as to the acknowledgment of a deed by a married woman, is to be judged of solely by what appears on the face of the certificate itself; and parol evidence is not admissible for the purpose of contradicting the certificate, except in cases of fraud and collusion.

Judge SERGEANT says, in delivering the opinion of the court: "The judge or justice of the peace in taking an acknowledgment, acts judicially, not ministerially. The law imposes on him the duty of ascertaining by his own view and examination, the truth of the matters to which he is to certify, and points out precisely his duty. Having thus intrusted him to see that the proper forms are observed, his solemn certificate that they have been observed, on the faith of which parties act, contracts are proceeded in, moneys are paid and deeds accepted, must, in the absence of fraud or collusion, be considered as entitled to full faith and credit; and cannot, without rendering titles to real estate exceedingly insecure, be left at any distance of time afterwards to the uncertainty and frailty of parol proof, and to all the mistakes, prejudices, imperfections, and hazards that attend it." *Schrader* v. *Decker*, 9 Barr 15; *Loudon* v. *Blythe*, 4 Harris 532, 3 Casey 22; *Michener and Wife* v. *Cavender*, 2 Wright 324, do but confirm and carry out the decision in *Jamison* v. *Jamison*, by holding that fraud and duress will avoid the certificate as to any party to the fraud or volunteers under him, with a saving to *bonâ fide* purchasers without notice.

I can see no difference between the case of the certificate of

acknowledgment by a married woman, and by a person *sui juris*. As to the married woman the acknowledgment is necessary to pass her interest, and as to the person *sui juris*, it is not. Its effect in the latter case is limited to rendering the deed admissible to record, and as a consequence, admissible in evidence. The certificate of acknowledgment in either case will not render a bad deed good. Fraud, forgery, or false personation will avoid the deed just as at common law, the certificate of acknowledgment to the contrary notwithstanding. Here is a case in which there is no pretence to invalidate the lease; no question as to its due execution; but simply the recording of it, and that on the ground, not that there was any fraud intended or practised in procuring the acknowledgment by the lessor, but simply that she did not go through the regular and accustomed form. She acknowledged before the magistrate that she had executed a lease of the premises to Tomlinson and Divine, but she did not acknowledge that paper to be the lease. The alderman certifies that she did; and we think, in the absence of fraud, parties claiming under the mortgagor, as the defendants do here, as well as the plaintiffs, ought not to be allowed to contradict his certificate. It is not the case where the acknowledgment is relied on as evidence of execution and delivery, when undoubtedly, though *primâ facie*, it may be contradicted. It is simply a question on the acknowledgment as entitling the paper to be recorded.

The plaintiff's paper-book does not show that the admission of the parol evidence was objected to on the trial; nor is it specifically made one of the reasons for a new trial. But we think that it is substantially included in the first reason assigned, that "the learned judge refused to instruct the jury as requested in the plaintiff's first point, which was, that the mortgage from William Tomlinson to Creighton and Pearce under proceedings in which the plaintiff purchased the machinery, &c., sued for in this action, was a valid mortgage under the Act of 27th April 1855." If the evidence to contradict the certificate was improperly admitted, it ought to have had no effect, and the jury should have been instructed that notwithstanding they should believe that evidence, it did not invalidate the acknowledgment, and that the lease had been duly recorded with the mortgage; in other words, the plaintiff's first point should have been affirmed. As we view it, it was the pivot on which the justice of the case turned; and con-

sidering, on the whole, that in consequence of the admission of this evidence, and the refusal of the court to charge as requested, there has been error, we grant a new trial.

STROUD, J., dissenting (after stating the facts).—The plaintiff requested me to charge: "That the mortgage from William Tomlinson to Creighton and Pearce under proceedings on which the plaintiff purchased the machinery, &c., sued for in this action, was a valid mortgage under the Act of Assembly of 27th April 1855, entitled 'An act to amend certain defects of the law,' &c."

There were several other propositions on which I was asked to charge, and upon which I gave or withheld directions. But there is no serious contest upon these.

Upon the first point I declined to charge as requested.

The proposition assumes that a certificate of an alderman, that a writing, the contents of which entitle it to be recorded, has been acknowledged before him, as their act and deed, by persons named as parties to such writing; forbids all inquiry as to the accuracy of the alderman's statement, but the same is to be regarded as absolute verity, although it be plain on the face of the writing, and can be shown by evidence *aliunde*, that the alderman was mistaken.

I am not aware of any decision of our court which gives countenance to this doctrine; *Jamison* v. *Jamison*, 3 Whart. 457, is said to support it. The syllabus of this case is, the certificate of the judge or justice as to the acknowledgment of a deed by a married woman is to be judged of solely by what appears on the face of the certificate itself; and parol evidence of what passed at the time of the acknowledgment is not admissible for the purpose of contradicting the certificate, except in cases of fraudulent imposition.

I agree entirely with everything which this decision affirms. In the absence of all evidence of imposition or collusion, each of which terms is used in the opinion of the court, and would constitute fraud, the certificate ought to be taken as true. It would destroy all confidence in titles were this not so, whether derived through conveyances of married or single persons. But surely, to take an example, were it clearly shown that a grantor had been personated by a stranger to the deed, it would be the rankest injustice to the real owner of property if proof of the fact should

be shut out; and I do not doubt that the rights of creditors of such personated individual would be equally protected by the law.

Schrader v. *Decker*, 9 P. S. R. 14, and *Loudon* v. *Blythe*, 16 Id. 532, s. c. 27 Id. 22, all show that such evidence is admissible wherever those to be reached by it are volunteers or purchasers with notice, or have a knowledge of facts which should have put them on inquiry. And *Michener* v. *Cavender*, 38 P. S. R. 334, sustains these decisions to the full extent. The action was upon a mortgage purporting to have been made by Michener and his wife to Cavender, and indorsed on the instrument was a certificate of an alderman stating that both the husband and wife had acknowledged the mortgage before him to be their act and deed; that the wife had been examined separately from her husband; that the contents were made known to her and she declared that the mortgage had been executed by her without any coercion or compulsion of her husband. Yet under an appropriate special plea, the wife was permitted to prove that the statement in the certificate as to her presence before the alderman, and of her acknowledgment after a separate examination, that the deed had been executed by her, &c., was utterly untrue.

In each of the decisions just cited, it was ruled that oral evidence contradicting the certificate, although admissible, yet could not prevail against a purchaser without notice of the fraud. Yet, it was also held, that the general principle that a knowledge of facts which ought to have put the purchaser upon inquiry, was equivalent to actual notice. The fact that the mortgagee was present some hours before the acknowledgment of the wife was certified to have been taken; and that she had expressed her unwillingness to execute the instrument, was sufficient to put him on inquiry as to the reality of the transaction: *Loudon* v. *Blythe*, 16 P. S. R. 532, and the same case on a second trial, 27 Id. 22. And the evidence of such knowledge was much slighter in *Michener* v. *Cavender*, and yet was deemed sufficient.

In the case in hand it was plain to the eye, that the instrument, which the alderman's certificate stated had been acknowledged before him, was not an original, but purported to be, and was a copy merely. It filled up the whole of a sheet of paper, and the signatures of the parties and of the witnesses were all in the same handwriting. The paper on which the acknowledgment was

written, was on a separate piece, but annexed by eyelets to the copy of the lease. Such a condition of things must be regarded as abundant evidence that the alderman's certificate did not import verity.

Share v. *Anderson*, 7 S. & R. 48, 63, presented a case in which a magistrate of York county took in Lancaster county an acknowledgment of a deed for lands lying in York. This was held to be nugatory; it was proved by oral evidence. The statement at page 48 shows this; and it is a fair, if not necessary implication, that there was nothing on the face of the acknowledgment to indicate it.

These cases, it is thought, are disposed of by the fact that the imposition was practised upon married women, and was a fraud which, if the magistrate's certificate could not be contradicted by oral evidence, would divest them of the property and thus work great injustice.

Mrs. Hurst, being but a lessor, and her rights being unaffected by the chattel mortgage, it is said the imposition upon her is not sufficient to overcome the general rule which prohibits all inquiry into the conduct of the magistrate.

This view of the subject overlooks the fact that it is to protect the interest of third persons—creditors and purchasers—that the law requires the lease to be recorded; and to put a copy on record and not the original, must be unavailing as notice, according to a train of decisions too numerous and too well known to need special citation. Yet, I thought upon the trial, and still think, as I have said already, that it was in the power of Mrs. Hurst, so far as she was concerned by intentional admission and acknowledgment before the alderman that the copy was her veritable act and deed, to adopt it and thus impart to the copy the character of an original document.

It was for this purpose, and not to defeat the plaintiff, that the oral testimony was received. Unless it could be sustained in this way, I considered that it would be my duty to say from inspection, that the lease, in the sense of the law, had not been recorded, and, therefore, the plaintiff had failed to make out his case.

I find it impossible to erase this impression from my mind, although the fact that I stand alone, is well calculated to make me distrust the soundness of my conclusion. And as by letting

the case go to the Supreme Court on the bill of exceptions, the law on which the whole turns would be settled either by affirming the judgment and so ending the controversy of the parties, or if reversed the result would be virtually the same. For from the nature of the subject the law being once ascertained, there will be no encouragement to a renewal of serious litigation.

On the other hand, by granting a new trial, it is not to be expected that the defendants will retire from the contest, but the whole ground will be fought over again; and however the verdict may be, the case will be carried up to the Supreme Court for final adjudication. It is from such considerations, that during the long period of my judicial connection with the court, it has been a fixed rule that whenever the judge, who presided at the trial, is willing to sign a bill of exceptions from which it is apparent that in whatever way the law shall be declared to be, the controversy must end, a rule for a new trial is always refused.

HARE, J., concurring with SHARSWOOD, P. J.—Two things are requisite to entitle a deed to be recorded: execution including delivery, and an acknowledgment in due form of law. On the former point, the certificate of acknowledgment is only *primâ facie* evidence, but it has been generally held to be conclusive on the latter, unless fraud can be brought actually or constructively home to the grantee. The reason of this distinction is sufficiently obvious. For if it was impossible to go behind an acknowledgment for any purpose, a man might be deprived of his land by a fraudulent pretence, that he had admitted a deed to be his which he had never seen or authorized. And, on the other hand, if the acknowledgment of a deed could be impeached by parol evidence, when the only question was, whether it was duly acknowledged, a ceremony intended to give security to purchasers would be an additional source of danger.

In the case of *Cavender* v. *Michener*, 2 Wright 335, which was tried before me, the execution and delivery of the mortgage were not at issue, having been admitted of record under the rules of this court; but this was not brought to the attention of the Supreme Court, who supposed that a question eminently of fact, had been withdrawn from the jury; and the result was the reversal of a judgment that might otherwise have been sustained. I do not, therefore, consider that case as tending to establish that the

certificate of a magistrate that a deed has been duly acknowledged, can be disproved for the purpose of subverting the title of an innocent grantee, where there is no dispute as to the execution of the deed.

The cause now before us is, in some respects, one of the first impression, arising under the provisions of a recent Act of Assembly with regard to mortgage of leases for years, and presented several nice questions that are not yet, perhaps, quite clear. One of these was, whether an instrument purporting to be a copy of an antecedent lease, could be recorded in place of the original, if acknowledged in due form of law. If the jury had found for the defendant under the instructions of the court, on the ground that the copy was not executed and delivered as a new lease, I should have been inclined to let their decision stand as the readiest means of obtaining the opinion of a court of error on the law. A copy is not necessarily a counterpart, and the question whether it is so or not, is mainly one of fact that may properly be left to and determined by a jury. But what the verdict tends, as I understand it, to establish, is not that the copy was not so ratified or confirmed as to become virtually an original, but that it was not duly acknowledged as a copy. And as this conflicts with the certificate of acknowledgment on a point where the certificate ought to be conclusive, a new trial should, in my opinion, be awarded.

The object of the recording acts is to give notice, and a formally authenticated copy may be as effectual for this purpose as the instrument which it represents. And this is consistent with the invariable practice, which has been to place a copy on record and not the deed. Whether that copy is transcribed from the original, or from a copy acknowledged by the grantor, can, as it would seem, make little difference to the grantor, or those claiming under him as creditors or purchasers. And it may well be, that if the mortgage is duly recorded, an acknowledged copy of the lease recorded with it will satisfy the requisitions of the law.

Rule absolute for new trial.